Note

How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law

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I. INTRODUCTION

In recent decades, the acceleration of two international trends—nationalism and economic interdependence—has heightened the ancient problem of extraterritorial prescriptive jurisdiction, or to what extent states may apply their laws outside their borders. Economic interdependence has prompted states to

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regulate transactions occurring outside their borders,[1] but states with concurrent jurisdiction over the same matters have often resisted these assertions of extraterritorial jurisdiction on the grounds of territorial sovereignty.[2] European states, for example, have vociferously protested the extraterritorial provisions of the Reagan administration's pipeline regulations[3] and the recent Cuban embargo legislation, known as the Helms-Burton Act.[4] The existence of such tension creates a temptation to fashion a legal regime that would govern conflicts of jurisdiction between states.

A decade ago the American Law Institute (ALI) attempted to fashion such a regime in the *Restatement (Third) of the Foreign Relations Law of the United States*.[5] The key jurisdictional provision of the *Restatement (Third)* was the "reasonableness requirement" of section 403, which stated that when a state has an accepted basis for prescriptive jurisdiction, it may not exercise that jurisdiction when it would be "unreasonable" to do so.[6] The restators claim that this requirement reflects customary international law.[7] At the same time, the *Restatement (Third)* adopts a positivist conception of international law, under which customary norms derive from state practice and opinio juris,[8] rather than a naturalist view of international law, under which norms derive from a notion of the good or the just.[9] Despite this adoption of a "hard" approach, the restators allowed their normative conception of the customary law of prescriptive jurisdiction to color their analysis of the existing law.

This Note argues that the reasonableness requirement of *Restatement (Third)* section 403 did not reflect the state of customary international law when the treatise was published in 1987, at least to the extent that it did not acknowledge that the United States had persistently objected to the emergence

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1. *See* J.G. CASTEL, EXTRATERRITORIALITY IN INTERNATIONAL TRADE: CANADA AND UNITED STATES OF AMERICA PRACTICES COMPARED 1 (1988).

2. *See* Kenneth W. Dam, Extraterritoriality and Conflicts of Jurisdiction, Address Before the American Society of International Law (Apr. 15, 1983), *in* UNITED STATES ECONOMIC MEASURES AGAINST CUBA 224, 226 (Michael Krinsky & David Golove eds., 1993) (noting sensitivity of states to sovereignty issues in "this modern age of nationalism").

3. *See infra* notes 86–88.

4. Cuban Liberty and Democratic Solidarity (Libertad) Act, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at U.S.C.A. §§ 6021–6091 (West 1997)).

5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)].

6. *Id.* § 403(1).

7. *See id.* § 403 cmt. a ("The principle that an exercise of jurisdiction . . . is . . . unlawful if it is unreasonable is established in United States law, and has emerged as a principle of international law as well."); *see also id.* at 231 ("Increasingly . . . these rules [of prescriptive jurisdiction], notably the principle of reasonableness . . . have been followed by other states and their courts and by international tribunals, and have emerged as principles of customary law.").

8. *See id.* § 102; *see also* Ruth Wedgwood, *Immunity and Prescription*, 14 YALE J. INT'L L. 489, 493 (1989) ("The *Third Restatement* takes a positivist view in which law is established by will and consent, not derived from any transcendent principle of nature . . . ."). Legal scholarship is dominated by this "hard" view of sources. *See* DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 35 n.41 (1987).

9. Under a "soft" view of sources, states are bound even without their consent by authoritative rules derived from notions of the good or the just. *See* KENNEDY, *supra* note 8, at 29–30; *see also* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 270–73 (1989) (stating objections to reliance on consent as sole source of international law).

of such a rule. Indeed, in 1993, the Supreme Court essentially rejected the view that the reasonableness requirement reflects customary law.[10] Nevertheless, U.S. courts, the State Department, and legal scholars have cited the reasonableness requirement as customary law and thereby contributed to the development of that norm. Moreover, the restators probably intended for the *Restatement (Third)* to have this influence.

Part II discusses the background of the *Restatement* process and the division of opinion over whether *Restatements* should state existing law or promote change in the law. Part III discusses the origins and content of the reasonableness requirement, and Part IV argues that this standard does not reflect customary international law. Part V documents the extent to which the reasonableness requirement nevertheless has been influential. Finally, Part VI argues that the development of a reasonableness requirement is undesirable, and that the ALI should, in the *Restatement (Fourth)*, indicate that the standard has not become customary law.

II. THE ALI AND THE *RESTATEMENT* PROCESS

The American Law Institute was founded in 1923 to promote the "clarification and simplification of the law and its better adaptation to social needs."[11] Its founding members perceived that the rapid increase in the number of common law decisions in the previous decades had created a high degree of legal uncertainty that could be reduced through the publication of authoritative "*Restatements*."[12] After the ALI embarked on this project, a disagreement quickly arose between the proponents of two views of the *Restatements*' function: that of stating existing law and that of promoting desirable change in the law.[13]

After pursuing the former approach during its first two decades,[14] the ALI changed course and began to adopt rules supported by a minority of jurisdictions when the majority rules seemed less sound.[15] One such adoption of a minority rule in the *Restatement (Second) of Torts*—in a section calling for strict product liability under certain circumstances—was criticized by the defense bar as a departure from the ALI's traditional role of stating the existing

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10. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797–98 (1993) (holding that under comity principles, court should decline to exercise jurisdiction under Sherman Act when actual conflict arises).

11. Geoffrey C. Hazard, Jr., *Forword* to RESTATEMENT (THIRD) at xi (internal quotation marks omitted).

12. *See* Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute: The Fairchild Lecture*, 1995 WIS. L. REV. 1, 11–12 (1995). For background on the ALI and its founding, see GEOFFREY C. HAZARD, THE AMERICAN LAW INSTITUTE: WHAT IT IS AND WHAT IT DOES 1–12 (1994); JOHN HONNOLD, THE LIFE OF THE LAW 144–80 (1964) (collection of materials addressing *Restatements*); and Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147 (1969).

13. *See* Abrahamson, *supra* note 12, at 17.

14. *See id.* at 19.

15. *See id.* at 20 (describing *Restatements* published after Second World War).

law.[16] In response, Herbert Wechsler, then Director of the American Law Institute, argued that there is no clear distinction between what the law "is" and what it "should be":

> I asked, therefore, if the statement of a rule does not involve something more than the conclusion that it is supported by the past decisions, for this is an implicit judgment that our courts today would not perceive a change of situation calling for the adaptation of the rule or even for a new departure. And if we ask ourselves what courts will do in fact within an area, can we divorce our answers wholly from our view of what they ought to do, given the factors that appropriately influence their judgments, under the prevailing view of the judicial function?[17]

In Wechsler's view, ALI restators would view their role as a judicial one and would not ignore opportunities to fill gaps in the law.

Against the background of this controversy, in 1965 the ALI published the *Restatement (Second) of the Foreign Relations Law of the United States*, covering both international law binding on the United States and U.S. law affecting the conduct of foreign relations.[18] The ALI presented the *Restatement (Second)* as "an attempt to state and clarify existing law" rather than as an attempt to "propose rules of law for adoption."[19] Reviewers were divided as to the *Restatement (Second)*'s success in doing so. Some sections were praised for accurately reflecting customary law.[20] Critics argued, however, that other sections, including a key jurisdictional provision, did not reflect international law.[21]

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16. *See* Wechsler, *supra* note 12, at 149. Other *Restatements* have been similarly criticized. *See, e.g.*, W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 25 (1985) (criticizing *Restatement (Second) of Contracts* as "simply the views of the drafter rather than any real attempt to restate what is the general common law").

17. Wechsler, *supra* note 12, at 149.

18. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at xi (1965) [hereinafter RESTATEMENT (SECOND)]. There is no "first" restatement of foreign relations law; the *Restatement (Second)* was so named because it represented the second effort by the ALI to restate U.S. foreign relations law. *See* Panel Discussion, *The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?*, 81 PROC. AM. SOC'Y INT'L L. 180, 180 (1987) [hereinafter 1987 ASIL Panel] (remarks of Harold Maier).

In 1923, the ALI had deemed international law an unsuitable topic for restatement. *See Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 1, 44 (1923) ("The unsuitability of a subject for immediate treatment may come from a variety of causes. . . . [I]t may not be in the power of the bar by a restatement, however good, to attain desirable results. Such a subject is international law.").

19. RESTATEMENT (SECOND) at xi.

20. *See* Covey T. Oliver, *Foreword*, 25 VA. J. INT'L L. 1, 2 (1984) (noting that *Restatement (Second)* was "old school" restatement that mirrored existing law); *see also* Oliver J. Lissitzyn, *The Law of International Agreements in the Restatement*, 41 N.Y.U. L. REV. 96, 112 (1966) (suggesting that *Restatement (Second)*'s formulation of norms governing international treaties constituted useful clarification and codification of customary law).

21. *See* Stanley D. Metzger, *The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U. L. REV. 7, 19–20 (1966) (arguing that *Restatement (Second)* section 40, which stated that international law required states to consider moderating their exercise of jurisdiction when another state had concurrent jurisdiction, was not supported by authority and did not reflect view of U.S. government officials); *see also* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads*, 76 AM. J. INT'L L. 280, 294 (1982) (citing Metzger's argument with approval); Cornelius F. Murphy, Jr., *State Responsibility for Injuries to Aliens*, 41 N.Y.U. L. REV. 125, 136 (1966) (stating that *Restatement (Second)*'s rules with respect to economic injuries to aliens "do not reflect a consensus adequate

International law developed in the postwar period at such a rate that within two decades the ALI expanded and updated its work with the publication of the *Restatement (Third)*.[22] Like its predecessor, the *Restatement (Third)* purported to reflect existing law; it represented the ALI's opinion as to "the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law."[23] Again, reviewers were divided as to its success in this regard. Numerous commentators reviewing *Restatement (Third)* section 403 have argued that it does not reflect customary international law.[24] One reviewer has argued that the *Restatement (Third)*'s formulation of the "effects" doctrine jurisdiction does not reflect U.S. or customary law.[25]

Other provisions of the *Restatement (Third)* that were criticized for not reflecting customary law include those on the law of the sea,[26] the act of state doctrine,[27] and treaty interpretation.[28] Reviewers have said that other provisions of the *Restatement (Third)*—on human rights,[29] environmental law,[30] the law of

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to support . . . an international legal norm"); Herbert W. Briggs, Book Review, 61 AM. J. INT'L L. 213, 214 (1967) (arguing that *Restatement (Second)* view of nationality of natural persons was "not supported by international law").

22. *See* Oliver, *supra* note 20, at 3 (noting that *Restatement (Third)* reflects "important developments" of previous decades).

23. *Id.*

24. *See* 1987 ASIL Panel, *supra* note 18, at 192 (remarks of Monroe Leigh) (noting that no international tribunal has held in favor of reasonableness requirement and that reporters have been "too prone . . . to finding new customary international law"); *id.* at 188 (comments of Cecil Olmstead) (noting that section 403's roots in international law "appear somewhat less than deep"); Cecil J. Olmstead, *Jurisdiction*, 14 YALE J. INT'L L. 468, 472 (1989) (noting implausibility of claim that *Restatement (Third)* section 403 has emerged as principle of international law); *see also* Maier, *supra* note 21, at 301 (noting that if judges relied on reasonableness requirement of draft section 403 they would be incrementally contributing to development of rule and playing role in formation of norm). *But see* Oliver, *supra* note 20, at 3 (arguing that reporters were conscientious in avoiding stating customary norms not supported by international opinion).

25. *See* Olmstead, *supra* note 24, at 471–72 (noting that *Restatement (Third)* formulation "appears to exceed judicial formulations of either U.S. or foreign courts" and has minimal support). The *Restatement (Third)* provides that a state has prescriptive jurisdiction over conduct that has *or is intended to have* substantial effect on U.S. territory. *See* RESTATEMENT (THIRD) § 402(1)(c) (emphasis added). This formulation deviates from the generally accepted rule stated in the *Restatement (Second)*: Jurisdiction may be exercised over conduct that is intended to have *and actually has* substantial effect within a state's territory. *See* RESTATEMENT (SECOND) § 18 (emphasis added).

26. *See* W.T. Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship?*, 14 YALE J. INT'L L. 508, 508–09 (1989) (reviewing *Restatement (Third)*); *see also* Kenneth R. Simmonds, *The Law of the Sea*, *in* COMMENTARIES ON THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 149, 153, 173–74 (International Lawyer ed., 1992) [hereinafter COMMENTARIES] (noting that treatment of law of sea is inconsistent and arbitrary).

27. *See* Monroe Leigh, Sabbatino*'s Silver Anniversary and the Restatement: No Cause for Celebration*, *in* COMMENTARIES, *supra* note 26, at 95, 96–97, 102–04 (arguing that *Restatement (Third)* "unjustifiably expands the doctrine"); *see also* Malvina Halberstam, Sabbatino *Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68, 90–91 (1985) (arguing that *Restatement (Third)* inaccurately describes law).

28. *See* United States v. Stuart, 109 S.Ct. 1183, 1196 (1989) (Scalia, J., concurring) (criticizing *Restatement (Third)* endorsement of use of pre-ratification materials to interpret text of treaties as proposal for change rather than reflection of U.S. or international law).

29. *See* Thomas E. Carbonneau, *The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised* Restatement, 25 VA. J. INT'L L. 99, 121–22 (1984) (noting neutral statement of general rules on law of state responsibility for injury to aliens and wide support for those rules); Lung-chu Chen, *Protection of Persons (Natural and Juridical)*, 14 YALE J. INT'L

remedies,[31] and the law[32] of foreign country money judgments—constitute narrow and cautious statements of customary norms. There was agreement that the *Restatement (Third)* would be influential—even treated as a "bible" by judges and practitioners who are generally unfamiliar with international law and who may find it difficult to obtain evidence of state practice and opinio juris.[33] Existing *Restatements* of domestic law already carried considerable weight because of the ALI's eminence and the thoroughness of its drafting process.[34] Commentators also noted that the *Restatement (Third)* might contribute to the formation of customary law, as foreign governments would rely on it when it supported their cases and use it against the U.S. government as a statement of U.S. practice,[35] notwithstanding the *Restatement (Third)*'s disclaimer that it is an independent work and does not represent the view of the U.S. government as to its legal obligations.[36]

The likely influence of the *Restatement (Third)* magnified the importance of its stating customary law accurately, given the ALI's claim that its document reflected state practice and opinio juris. If the rules said to reflect custom in fact

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L. 542, 552 (1989) (noting *Restatement (Third)*'s careful selection of short list of human rights norms); Daniel T. Murphy, *The* Restatement (Third)*'s Human Rights Provisions: Nothing New, But Very Welcome, in* COMMENTARIES, *supra* note 26, at 175, 178 (noting conservative statement of human rights norms with "overwhelming" support by authorities); James A.R. Nafziger, *Restating the Rights of Aliens*, 25 VA. J. INT'L L. 125, 140 (1984) (noting conservative statement of aliens' rights despite strong forces expanding law in this area).

30. *See* David D. Caron, *The Law of the Environment: A Symbolic Step of Modest Value*, 14 YALE J. INT'L L. 528, 528, 540 (1989) (arguing that *Restatement (Third)* analyzes only narrow portions of international environmental law).

31. *See* Lea Brilmayer, *International Remedies*, 14 YALE J. INT'L L. 579, 579, 589 (1989) (criticizing *Restatement (Third)* for narrow, legalistic view of remedies).

32. *See* Werner F. Ebke & Mary E. Parker, *Foreign Country Money-Judgments and Arbitral Awards and the* Restatement (Third) of the Foreign Relations Law of the United States*: A Conventional Approach, in* COMMENTARIES, *supra* note 26, at 115, 147–48 (noting *Restatement*'s careful and conservative statement of law).

33. *See, e.g.*, Panel Discussion, *The Draft Restatement of Foreign Relations Law of the United States (Revised)*, 76 AM. SOC'Y INT'L L. PROC. 184, 195 (1982) [hereinafter 1982 ASIL Panel] (comments of John Houck); *see also* Richard Falk, *Conceptual Foundations*, 14 YALE J. INT'L L. 439, 441 (1989); Maier, *supra* note 21, at 316; Karl M. Meessen, *Foreword to Special Review Essays: The Restatement (Third) of the Foreign Relations of the United States*, 14 YALE J. INT'L L. 433, 433 (1989) (noting likely impact of *Restatement* on practitioners); 1987 ASIL Panel, *supra* note 18, at 194 (comments of Detlev Vagts) (noting likely influence of *Restatement (Third)* on judiciary). As predicted, the *Restatement (Second)* and the *Restatement (Third)* have been cited extensively by U.S. courts. *See* RESTATEMENT (THIRD) (Supp. 1986) (cumulative case citations to both *Restatements*).

34. *See* Falk, *supra* note 33, at 439–41. As of March 1994, the ALI had counted over 125,000 judicial citations to its *Restatements*. *See* Abrahamson, *supra* note 12, at 4.

35. *See* 1987 ASIL Panel, *supra* note 18, at 186 (comments of Cecil Olmstead) (noting likely influence of *Restatement* on litigation and state practice); Meessen, *supra* note 33, at 435; *see also* Rudolf Bernhardt et al., *Restatement of the Law Third: The Foreign Relations Law of the United States*, 86 AM. J. INT'L L. 608, 609 (1992) (book review) (noting that *Restatement (Third)* would give lawyers in other countries information about "prevailing American views on international law"); Karl M. Meessen, *Conflicts of Jurisdiction and the New Restatement*, 50 LAW & CONTEMP. PROBS. 47, 53 (1987) ("[T]oday's *lex ferenda* might be tomorrow's *lex lata* if only due to the impact of the *Restatement* itself.").

36. *See* RESTATEMENT (THIRD) 3 (quoting and incorporating statement from *Restatement (Second)* that "'[t]he positions or outlooks of particular states, including the United States, should not be confused with what a consensus of states would accept or support'"); *see also* Hazard, *supra* note 11, at ix ("In a number of particulars the formulations in this Restatement are at variance with positions that have been taken by the United States government.").

did not, practitioners would replicate serious misstatements of law. The next two parts will examine the content of the reasonableness requirement—and to a lesser degree the restrictions regarding the regulation of foreign subsidiaries—and argue that it does not, in fact, reflect customary law binding on the United States.

III. THE ORIGINS AND CONTENT OF THE REASONABLENESS REQUIREMENT

Under international law, a state is subject to limitations on its jurisdiction to prescribe, that is, its power "to make its laws applicable to the activities, relations, or status of persons."[37] The legal regime governing the exercise of prescriptive jurisdiction arose as a result of the development of the territorial state in the sixteenth and seventeenth centuries.[38] States customarily recognized that each had absolute authority within its borders.[39] Throughout the nineteenth century, customary law did not permit extraterritorial prescriptions of law.[40]

As interstate commerce increased, states began to recognize the existence of other bases of prescriptive jurisdiction.[41] A milestone in this transformation away from strict territorial limits was the decision of the Permanent Court of International Justice in the *Case of the S.S. Lotus*,[42] in which the court held that customary law did not prohibit Turkey from asserting criminal jurisdiction over the officers of a French ship that had collided on the high seas with a Turkish vessel, killing several Turkish crew members.[43] Rejecting the view that there are strict territorial limits on prescriptive jurisdiction, the court recognized the "effects" doctrine: A state may prescribe law for conduct that occurs outside its territory but has effects within it.[44] The *Lotus* holding was quickly adopted

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37. RESTATEMENT (THIRD) § 401(a).

38. *See* Harold G. Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again"*, 25 VA. J. INT'L L. 7, 11 (1984).

39. *See id.*

40. *See* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 1, 6–20 (1992). The Supreme Court endorsed this view in American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (holding that Sherman Act jurisdiction did not extend outside U.S. territory).

41. *See* Born, *supra* note 40, at 1, 21–54 (describing erosion of territorial limits on prescriptive jurisdiction).

42. Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

43. *Id.* at 32.

44. *Id.* at 19–20. *Lotus* has also been cited for the proposition that international law permits states to legislate extraterritorially with complete freedom, except where a specific rule restricts that freedom. *See, e.g.*, David H. Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 LAW & CONTEMP. PROBS. 283, 292 (1983) (citing State Department view of *Lotus* rule); Maier, *supra* note 38, at 12 (citing *Lotus* for proposition that customary law does not contain general prohibition on application of prescriptive jurisdiction to foreign activity). This argument is based on the following passage from *Lotus*:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibited rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

Lotus, 1927 P.C.I.J. (ser. A) No. 10, at 19. It was not necessary for the holding in *Lotus*, however, for

by other authorities.[45] In 1935, the *Harvard Research in International Law Study on Jurisdiction with Respect to Crime* documented state practice that recognized the effects doctrine, as well as the nationality principle, as acceptable bases of criminal jurisdiction.[46] United States courts adopted the effects doctrine in the antitrust area beginning in 1945.[47]

The *Restatement (Second)* recognized the effects doctrine as one of the legitimate bases for the exercise of jurisdiction.[48] When two states had jurisdictional links to the same activity, according to the *Restatement (Second)*, they each had one further obligation:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
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> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[49]

This section of the *Restatement (Second)* is the direct precursor of *Restatement (Third)* section 403. Based on developments in the law that occurred after the publication of the *Restatement (Second)*, the reporters of the *Restatement (Third)* adopted a new, stronger rule: Whereas section 40 merely required states to consider moderating their enforcement of laws that they were authorized to prescribe, section 403 now defines reasonableness as "an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe."[50]

The *Restatement (Third)* states two preconditions to the legal exercise of jurisdiction. The first condition is the existence of a link between the regulating state and the regulated activity. An example of an accepted link is territory: A state is permitted to regulate conduct that either takes place within its territory

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the court to recognize a sweeping default rule in favor of the legality of extraterritorial jurisdiction. The court probably intended the presumption to apply only in cases such as *Lotus* where a clear link existed between the forum state and the regulated activity. *See* A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 263 (1981).

45. *See* Born, *supra* note 40, at 25–26.

46. *See Jurisdiction with Respect to Crime, reprinted in* 29 AM. J. INT'L L. 435, 480, 500–03, 519 (Supp. 1935) (study by Harvard Research in International Law); *see also* Joseph J. Norton, *Extraterritorial Jurisdiction from a Differing Perspective: Section 416 of the Restatement (Third) and "Jurisdiction To Regulate Activities Related to Securities", in* COMMENTARIES, *supra* note 26, at 43 (noting Harvard Study formed "prime basis" for *Restatement (Second)* position on jurisdiction).

47. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443–44 (2d Cir. 1945) (permitting application of antitrust laws to activity that has and is intended to have effects in United States).

48. *See* RESTATEMENT (SECOND) § 18.

49. *Id.* § 40. Section 40 of the *Restatement (Second)* was drawn from conflicts of laws principles. *See generally* RESTATEMENT (SECOND) OF THE CONFLICTS OF LAWS § 6 (listing factors for balancing).

50. RESTATEMENT (THIRD) § 403 rep. note 10.

or has, or is intended to have, a substantial effect within its territory.[51] Another accepted link under the *Restatement (Third)* is nationality: A state may regulate the activity of its citizens who are abroad.[52] Where territoriality, nationality, or another accepted link[53] is present, prescriptive jurisdiction is said to exist.

According to the *Restatement (Third)*, customary law's second precondition to the legitimate exercise of prescriptive jurisdiction is the reasonableness requirement of section 403. Section 403(1) states: "Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is *unreasonable*."[54] Whether an exercise of jurisdiction is unreasonable turns on an evaluation of eight different factors, including the closeness of the link between the regulated activity and the regulating state, the character of the activity to be regulated, and the likelihood of conflict with regulation by another state.[55]

Even after a state's exercise of prescriptive jurisdiction has been determined to be reasonable under the eight factors, a final condition must be met in cases in which another state has concurrent jurisdiction over the same matter. In such cases, according to the *Restatement (Third)*, "each state has an obligation" to evaluate, in light of the relevant factors, the relative interests of the two states.[56] The state with the lesser interest "should defer" to the state

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51. *See id.* § 402(1)(a)-(c). The section reads:

> Subject to § 403, a state has jurisdiction to prescribe law with respect to (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory.

Id.

52. *See id.* § 402(2) ("Subject to § 403, a state has jurisdiction to prescribe law with respect to . . . the activities, interests, or relations of its nationals outside as well as within its territory.").

53. The *Restatement (Third)* recognizes jurisdictional links based on conduct directed against the security interests of a state and over conduct that is universally recognized as unlawful, such as terrorism. *See id.* §§ 402(3), 404.

54. *Id.* § 403(1) (emphasis added).

55. *See id.* § 403(2). Factors to be considered under section 403(2) include, but are not limited to:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
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> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
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> (c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulated such activities, and the degree to which the desirability of such regulation is generally accepted;
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> (d) the existence of justified expectations that might be protected or hurt by the regulation;
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> (e) the importance of the regulation to the international political, legal, or economic system;
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> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

Id.

56. *See id.* § 403(3).

with the greater interest.[57] According to section 403 of the *Restatement (Third)*, then, in many circumstances a state must surmount three hurdles before it may exercise prescriptive jurisdiction.

IV. WHY THE ALI'S REASONABLENESS REQUIREMENT DOES NOT REFLECT CUSTOMARY LAW

The *Restatement (Third)* claims that two developments in the law prompted its adoption of the reasonableness requirement in place of *Restatement (Second)* section 40. The first development was a series of protests by foreign states in response to what were called "extravagant and exorbitant exercises of jurisdiction."[58] The second development that inspired this change was the adoption of a "jurisdictional rule of reason" in *Timberlane Lumber Co. v. Bank of America*[59] and other U.S. cases. According to Louis Henkin, chief reporter of the *Restatement (Third)*, the reporters "tried to combine" these two developments "into a principle of international law which we think our courts would accept and has a good chance of being accepted by the people abroad as a restatement of what they are doing."[60] Whether these "two developments" formed an adequate basis for the existence of a rule of customary law will be examined in this part.

A. *Diplomatic Protests and U.S. Decisions To Moderate Jurisdiction*

As evidence that the reasonableness requirement reflects state practice, the *Restatement (Third)* cites examples in which European states have "questioned" various applications of U.S. jurisdiction as "exorbitant"[61] and in which the United States has then withdrawn or moderated the reach of the regulation to bring its practice into line with the norm.[62] In addition, as evidence that the reasonableness standard is customary law, the *Restatement (Third)* notes that legislatures in the United States and elsewhere have "generally refrained from exercising jurisdiction where it would be unreasonable to do so."[63] These protests, responses, and abstentions did not, however, constitute consistent state practice, accompanied by opinio juris, in support of the reasonableness requirement.

Diplomatic protests did not represent state practice consistent with the

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57. *See id.*

58. *See* 58 A.L.I. PROC. 262 (1981) (comments of Louis Henkin); *see also* RESTATEMENT (THIRD) 236–37 (asserting that diplomatic protests against U.S. assertions of jurisdiction contributed to development of reasonableness requirement).

59. 549 F.2d 597, 613–14 (9th Cir. 1976).

60. 58 A.L.I. PROC. 262 (1981) (comments of Louis Henkin).

61. RESTATEMENT (THIRD) § 403 rep. note 1.

62. *See id.* at 236 (arguing that U.S. government reduced extraterritorial reach of antitrust and securities laws in response to diplomatic protests); *id.* § 414 rep. note 3 (stating that in 1970s United States temporarily became more sensitive to objections to its assertions of jurisdiction over foreign subsidiaries).

63. *Id.* § 403 cmt. a.

standard because states objected to U.S. regulations on the grounds of "exorbitance," not "unreasonableness."[64] Exorbitant is not the same as unreasonableness;[65] all exorbitant acts are unreasonable, but not all unreasonable acts are exorbitant. One participant in the ALI's floor debates regarding section 403 suggested that the *Restatement (Third)* define unreasonableness narrowly, as that which would "shock the expectations of the community of nations," rather than as that which the international community would calmly evaluate and decide to reject.[66] Pursuant to this suggestion, the restators at one point considered changing "unreasonable" in a draft of section 403 to "extravagant or exorbitant";[67] it is not clear why they did not. Diplomatic protests of U.S. regulations, then, demonstrate only that state practice supports a de minimis rule that "exorbitant" or "extravagant" exercises of jurisdiction are prohibited.

Second, when European states protested U.S. exercises of jurisdiction, they did not call for the adoption of an independent norm of reasonableness, under which jurisdiction based on an accepted link would be evaluated in light of the eight factors suggested by *Restatement (Third)* section 403(2).[68] Rather, the states argued that the United States lacked a jurisdictional nexus to the regulated activity in the first place. As Chief Reporter Louis Henkin noted, "[t]he world community . . . has not used the term reasonableness. . . . They have made those objections, however, as a matter of interpretation of the 'effects principle,' calling the U.S. interpretation extravagant and its application exorbitant."[69] At most, these objections reflect a view as to how the traditional jurisdictional links should be interpreted—that they should not be interpreted to permit jurisdiction when the links between the regulating state and the regulated conduct are de minimis. The U.S. government interprets the rules of prescriptive jurisdiction in this manner. As Davis Robinson, then-Legal Adviser of the U.S. Department of State, stated in 1983, "[i]f there is a universally recognized prohibitive rule, it is that a state may not exercise jurisdiction over events or persons abroad unless that state has some genuine link with those persons or events."[70]

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64. *See supra* text accompanying note 58.

65. *See* Joseph J. Norton, *Extraterritorial Jurisdiction from a Differing Perspective*, *in* COMMENTARIES, *supra* note 26, at 41, 58 ("It probably could be concluded that most member states would agree that a state and its courts should not extend jurisdiction in 'exorbitant' situations. This, however, is not the same as purporting that a 'principle of reasonableness' is to apply in all situations.").

66. *See* 58 A.L.I. PROC. 253, 263 (1981) (comments of Louis B. Schwartz).

67. *See* 58 A.L.I. PROC. 264, 290 (1981) (comments of Louis Henkin).

68. *See supra* note 55.

69. *See* 58 A.L.I. PROC. 262 (1981) (comments of Louis Henkin); *see also* RESTATEMENT (THIRD) § 403 rep. note 1 ("These objections have usually been articulated in terms that sought to limit the scope of a particular basis of jurisdiction, but they reflect the view that the bases of jurisdiction must be interpreted and applied reasonably, and indicate a perception as to what is reasonable in particular circumstances.").

70. Davis R. Robinson, Speech Before the Association of the Bar of the City of New York (Feb. 14, 1984), *in* 2 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–1988, at 1329, 1330 (1994) [hereinafter CUMULATIVE DIGEST]; *see also* David H. Small, *Managing Extraterritorial Jurisdiction: The United States Government Approach*, 50 LAW & CONTEMP. PROBS. 283, 292 (1987) (discussing U.S. government rule that only firmly established prohibitive rule of jurisdiction is "a threshold

Finally, even if foreign states had protested U.S. exercises of jurisdiction on the basis of a reasonableness requirement, those protests alone would not have been sufficient to bring a new rule of customary law into being. Under the *Restatement (Third)*'s own view of customary law sources, prohibitive rules must be supported by sufficient state practice and opinio juris.[71] To establish a reasonableness requirement, then, there would have to be evidence of a widespread state practice of abstention from unreasonable exercises of jurisdiction following from a sense of legal obligation. Evidence of custom is increasingly difficult to establish.[72] There is no evidence that any state has declined to exercise jurisdiction when an accepted link existed, on the grounds that such exercise would be unreasonable.[73] In the absence of such evidence, when assertions of jurisdiction by the United States are met by protests, the assertion and the protest "cancel each other out, with the result that no rule of customary law comes into being."[74] Without the concurrence of the United States, a major power in the field of extraterritorial regulation, it is difficult for a custom in this area to come into being.[75] At most, a particular or regional custom might be said to have developed among the states that have consistently abstained from unreasonable assertions of jurisdiction, based on a sense of legal obligation.[76]

In cases in which Congress, U.S. courts, or agencies have acted to reduce the reach of jurisdiction following diplomatic protests, their actions have not been accompanied by a sense of legal obligation. When Congress, following diplomatic protests, limited application of U.S. antitrust laws to foreign

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requirement that a state have a sufficient nexus with the matter to justify an assertion of jurisdiction"). Small was the Department of State Assistant Legal Adviser for Economic, Business, and Communication Affairs from 1983 to 1987. *See id.* at 283.

71. *See supra* text accompanying note 8; *see also* Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 38 (1974–1975) ("In the case of rules imposing duties, it is not enough to show that States have acted in the manner required by the alleged rule, and that other states have acquiesced in such action. There must be statements by States that they regard such action as obligatory, not voluntary.").

72. *See* 1982 ASIL Panel, *supra* note 33, at 185 (comments of Cecil T. Oliver) ("A true rule of customary international law requires proof of acceptance by a heavy preponderance of states, and to determine this in a world of increasing diversity . . . is difficult.").

73. *See* 58 A.L.I. PROC. 285 (1981) (comments of Malvina H. Guggenheim) ("A lot of states have declined or have not exercised the jurisdiction, but I don't know of any that has said, 'We believe that under international law we may not.'").

74. *See* Akehurst, *supra* note 71, at 39; *see also id.* at 37 ("States assert that something is already a rule of international law. . . . If other States acquiesce, a new rule of customary law comes into being."); Myres McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 357–58 (describing development of customary international law of the sea as part of "process of continuous interaction, of continuous demand and response [through which] reciprocal tolerances . . . create the expectations of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law").

75. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 7 (3d ed. 1991) ("[I]t is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. . . . [F]or a custom to be accepted and recognized it must have the concurrence of the major powers in that particular field."); *see also* Akehurst, *supra* note 71, at 17 (arguing that for custom to emerge, "[S]tate practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform") (citation omitted).

76. *See* RESTATEMENT (THIRD) § 102 cmts. b, e.

commerce having a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce,[77] at most it acknowledged the view that effects-based jurisdiction should not be based on de minimis contacts. However, it did not acknowledge an independent norm of reasonableness. Moreover, this limitation applies only to foreign commerce other than imports.[78] United States courts and agencies applying the Sherman Act to foreign-import commerce do so on the basis of the effects doctrine and do not independently evaluate the reasonableness of the exercise.[79] Thus, all three branches of the U.S. government have continued to assert jurisdiction based on the effects doctrine notwithstanding foreign protests, and none has acknowledged the existence of an independent reasonableness requirement.

The *Restatement (Third)* also suggests that the United States indicated acquiescence to a reasonableness requirement when, in response to diplomatic protests, it dismantled Cold War export controls that regulated the extraterritorial conduct of foreign subsidiaries of U.S. corporations.[80] For example, when Congress, in 1977, limited the application of the Trading with the Enemy Act to wartime situations,[81] it also enacted the International Emergency Economic Powers Act (IEEPA),[82] a sweeping act under which the Carter administration later froze Iranian assets,[83] and which reached foreign branches of U.S. banks.[84] In the same act, Congress also expanded the executive branch's power under the Export Administration Act of 1969 to prohibit exports from any country of goods or technology exported by foreign subsidiaries of U.S. corporations.[85] The Reagan administration then relied on the Export Administration Act to implement the pipeline regulations, which prohibited U.S. corporations and their foreign subsidiaries from contributing to the building of a natural-gas pipeline between Western Europe and Siberia.[86] The implementation of these statutes and regulations undermines the claim that

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77. *See* Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6(a), 45(a)(3) (1994); *see also* RESTATEMENT (THIRD) § 415 cmt. b, rep. note 8 (discussing same).

78. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 12 (1995) [hereinafter ANTITRUST GUIDELINES].

79. *See id.* at 12 (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (holding that "Sherman Act applies to foreign conduct that was meant to produce and that did in fact produce some substantial effect in the United States")).

80. *See* RESTATEMENT (THIRD) § 414 rep. note 3; *see also id.* § 414 rep. note 4.

81. Act of Dec. 28, 1977, Pub. L. No. 95-223, tit. I, 91 Stat. 1625 (codified as amended at 50 U.S.C. §§ 1701–1706 (1994)); *see also* RESTATEMENT (THIRD) § 414 rep. note 3.

82. Act of Dec. 28, 1977, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626 (codified as amended at 50 U.S.C. §§ 1701–1706 (1994)).

83. *See* Exec. Order No. 12,205, 3 C.F.R. 248 (1980), *reprinted in* 50 U.S.C. § 1701 app. at 191 (1994); Exec. Order No. 12,211, 3 C.F.R. 253 (1980) (revoked 1981), *reprinted in* 50 U.S.C. § 1701 app. at 191 (1994); *see also* John Ellicott, *Extraterritorial Trade Controls—Law, Policy, and Business*, *in* PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 1, 4 (1983).

84. *See* Iranian Assets Control Regulations, 31 C.F.R. 535.329 (1980); *see also* RESTATEMENT (THIRD) § 414 rep. notes 4, 7.

85. *See* Act of Dec. 28, 1977, Pub. L. No. 95-223, tit. III, 91 Stat. 1625, 1629; *see also* Ellicott, *supra* note 83, at 5–6.

86. *See* 47 Fed. Reg. 27,250–52 (1982); RESTATEMENT (THIRD) § 414 rep. note 8; CASTEL, *supra* note 1, at 159–61.

in the 1970s the United States began to acquiesce to a new norm restricting prescriptive jurisdiction.

The pipeline regulations were themselves withdrawn after European states protested their legality.[87] However, as in other cases in which the United States withdrew or scaled back assertions of extraterritorial jurisdiction, the changes resulted largely from political and diplomatic considerations and were not accompanied by a sense of legal obligation.[88] In response to the protests, Deputy Secretary of State Kenneth Dam stated that "this government took the same position that administration after administration, and Congress after Congress, have taken—namely, that the relationship between a parent and a subsidiary . . . justifies the assertion of American jurisdiction when substantial American interests are involved."[89] Soon after the pipeline regulations were withdrawn, Congress reenacted the Export Administration Act with the same authority to regulate foreign subsidiaries that European states had protested.[90] Recently Congress has extended the reach of the Cuban embargo to cover foreign subsidiaries of U.S. corporations[91] and enacted new sanctions that reach any firm "trafficking" in confiscated property claimed by U.S. nationals.[92]

Finally, there is nothing to suggest that states agree on how a multiple factor test would be used to determine reasonableness. For the reasonableness requirement as drafted by the ALI to become customary international law would require the development of a significant body of state practice demonstrating how courts and executive branches actually weigh the eight factors that constitute the standard. One member of the ALI's International Advisory Panel for the *Restatement (Third)*, Karl M. Meessen, has argued that the range of factors to be considered under section 403 is so long, and the state practice is so divergent, that "no chance exists" that the *Restatement (Third)* formulation

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87. *See* RESTATEMENT (THIRD) § 414 rep. note 8; *see also* European Communities, *Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., reprinted in* 21 I.L.M. 891 (1982) (protesting pipeline regulations); United Kingdom, *Statement and Order Concerning the American Export Embargo with Regard to the Soviet Gas Pipeline, reprinted in* 21 I.L.M. 851 (1982).

88. *See* 63 A.L.I. PROC. 100 (comments of David Small); *see also* 63 A.L.I. PROC. 103 (comments of Bennett Boskey, adviser to *Restatement (Third)*) ("There were so many reasons why the United States should have withdrawn from [imposing the pipeline sanctions] that it doesn't seem that it's fair to allocate it to an international law obligation.").

89. Kenneth W. Dam, Address Before the American Society of International Law (Apr. 15, 1983), *in* 2 CUMULATIVE DIGEST, *supra* note 70, at 1323, 1325); *see also* Small, *supra* note 70, at 292 (providing U.S. Department of State view that ownership and control of corporation are examples of "other real ties that support limited exercises of jurisdiction").

90. *See* 63 A.L.I. PROC. 100 (comments of David Small); *see also* John Ellicott, *From Pipeline to Panama—the Evolution of Extraterritorial Trade and Financial Controls, in* PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS, *supra* note 83, at 7-1, 7-16 (noting failure of Congress to curtail executive power under Export Administration Act after pipeline controversy); *cf.* Export Administration Amendment Act of 1985, Pub. L. No. 99-64, 99 Stat. 120 (codified at 50 U.S.C. App. § 2405 (1994)).

91. Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (codified at 22 U.S.C. § 6005(a)(1) (1994)) (prohibiting transaction between Cuba and U.S.-owned or U.S.-controlled foreign firms, as defined by 31 C.F.R. § 515.559 (1996)).

92. *See* 22 U.S.C. § 6023 (1997).

could become customary law.[93]

Even if the reasonableness requirement could be said to have emerged as customary law, it would not be binding on the United States. Under the persistent objector principle, a state that clearly indicates its rejection of an emerging rule is not bound by it.[94] The United States consistently has stated its position that the only international legal limit on the exercise of prescriptive jurisdiction is the existence of a genuine link.[95] Then-Legal Adviser Robinson stated in 1983 that the reasonableness requirement "does not accurately reflect the state of international law."[96] To reflect customary law binding on the United States accurately, the *Restatement (Third)* should acknowledge such persistent objections to the emergence of a reasonableness requirement.

The *Restatement (Third)* should also acknowledge that the United States has persistently objected to the rule that a state may exercise jurisdiction over foreign subsidiaries of corporations registered under its laws only in "exceptional cases."[97] The restriction derives from the *Restatement*'s view that corporate nationality is determined by the place of incorporation.[98] There is ample basis in international law, however, for a state to regard ownership and control by its citizens as a basis of corporate nationality.[99] State practice is not

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93. Meessen, *supra* note 35, at 59; *see also* Norton, *supra* note 65, at 59 (concluding that reasonableness requirement cannot be viewed as "rule" formed through consensus of states but is "a discretionary approach to be taken by an enlightened legislature or judiciary").

94. *See* RESTATEMENT (THIRD) § 102 cmt. d (defining persistent objector as "a state that indicates its dissent from a practice while the law is still in the process of development [and therefore] is not bound by that rule even after it matures"); Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 2 (1985) ("[V]irtually all authorities maintain that a State which objects to an evolving rule of general customary international law can be exempted from its obligations."); Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 458 (1995) ("A state that has persistently objected to a rule is not bound by it, so long as the objection was made manifest during the process of the rule's emergence.").

95. *See supra* text accompanying note 70.

96. Davis R. Robinson, *Conflicts of Jurisdiction and the Draft Restatement*, 15 LAW & POL'Y INT'L BUS. 1147, 1152 (1983); *see also* Dam, *supra* note 89, at 1325 (noting that Department of State was "not altogether satisfied with making a balancing test the prerequisite to the *existence* of jurisdiction"). The U.S. government generally does not support the development of a reasonableness requirement; rather, it views the existence of any basis for jurisdiction as legally sufficient. *See* UNITED STATES ECONOMIC MEASURES AGAINST CUBA 223-24 (Michael Krinsky & David Golove eds., 1993).

97. *See* RESTATEMENT (THIRD) § 414(2)(b).

98. *See id.* § 213.

99. International law allows a state to consider a corporation as its national under three different conditions: (1) if the corporation is established under its law; (2) if it has its center of management or exploitation there; or (3) if it is controlled by shareholders who are its nationals. *See* 1 GEORG SCHWARTZENBERGER, INTERNATIONAL LAW 389, 393, 411 (3d ed. 1957); IGNAZ SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 8 (1987); *see also* J. Mervyn Jones, *Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies*, 26 BRIT. Y.B. INT'L L. 225, 237, 251 (1949) (noting that substantial body of evidence supports control-based test of corporate nationality); Herman Walker Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 381 (1956) (noting that the control theory sometimes had been favored in projected multilateral conventions and treaties dealing with foreign corporations).

The *Barcelona Traction Case*, in which the International Court of Justice held that a state representing the controlling shareholders of a corporation lacked standing to assert diplomatic protection on their behalf where the state of incorporation could assert diplomatic protection, casts doubt on the control-based test of corporate nationality. *See* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 4

consistent enough to support the existence of a rule that the place of incorporation is the principal basis for the determination of nationality.[100] The United States has adopted a control test in several situations, intervening diplomatically on behalf of national shareholders for the protection of property interests in foreign-incorporated entities.[101] The *Restatement (Second)* permitted states to exercise prescriptive jurisdiction over corporations owned or controlled by their nationals.[102] Further, no U.S. court has ever invalidated an extraterritorial regulation adopted for national security reasons on the grounds stated in *Restatement (Third)* section 414.[103] According to the *Restatement (Third)*, Canada and several European states have regulated the overseas activities of their foreign subsidiaries in certain circumstances.[104] Accordingly, commentators have argued that *Restatement (Third)* section 414 does not reflect customary law.[105] In any case, the United States government has persistently objected to the emergence of such a rule.

B. *Applications of the Reasonableness Requirement by U.S. Courts*

The second basis from which the *Restatement (Third)* derived the reasonableness requirement was a series of decisions in which U.S. courts purportedly adopted the standard from a sense of legal obligation.[106] Although several U.S. courts have applied multifactor tests to determine whether the exercise of jurisdiction would be unreasonable, this state practice was not

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(Judgment of Feb. 5); Stanley J. Marcuss & Eric L. Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439, 457 (1981). The court acknowledged, however, that no test had found general acceptance, leaving room for argument that the control-based test is permissible in other circumstances. *See id.* at 457.

100. *See, e.g.*, William Laurence Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on* Fruehauf v. Massardy, 83 HARV. L. REV. 579, 589–90 (1970) (stating that international law principles for determining nationality of corporations are "unsettled"); Robert B. Thompson, *United States Jurisdiction over Foreign Subsidiaries: Corporate and International Law Aspects*, 15 LAW & POL'Y INT'L BUS. 319, 362, 374, 377 (1983) (noting little evidence of consensus among states of separateness of corporation as rule of international law); Sigmund Timberg, *Corporate Fictions: Logical, Social and International Implications*, 46 COLUM. L. REV. 533, 572 (1946) (noting "confusion and uncertainty" regarding nationality of corporations under international law).

101. *See* Jones, *supra* note 99, at 229–31, 257–58 (discussing U.S. diplomatic intervention on behalf of U.S. owners of enterprises incorporated in Portugal and Mexico).

102. *See* RESTATEMENT (SECOND) § 27 cmt. d.

103. *See* Stanley J. Marcuss, *Jurisdiction with Respect to Foreign Branches and Subsidiaries: Judicial Power in the Foreign Affairs Context Under Section 414 of the Foreign Relations Restatement*, *in* COMMENTARIES, *supra* note 26, at 21–22.

104. *See* RESTATEMENT (THIRD) § 414 rep. note 2.

105. *See* Andreas F. Lowenfeld, *International Business: Regulation and Protection*, 78 HARV. L. REV. 1699, 1705 (1965) (book review) (noting that "there is little substance" to charge that U.S. extraterritorial regulation of foreign subsidiaries violated international law); Marcuss, *supra* note 103, at 34 (stating that *Restatement (Third)* § 414 represents "prescription . . . of what the law might or should be in the future").

106. *See* RESTATEMENT (THIRD) § 403 rep. note 2 (citing *Timberlane Lumber Co.* for proposition that "[s]ome courts have addressed [U.S. jurisdiction to prescribe] from the point of view of 'comity,' but seen as a matter of obligation among states"); *id.* at 231 (stating that its rules governing prescriptive jurisdiction, including reasonableness requirement, "reflect development in the law as given effect by U.S. courts" and noting that "[t]he courts appear to have considered these rules as a blend of international law and domestic law, including international 'comity' as part of that law").

accompanied by opinio juris.

In the 1970s, several U.S. courts converted the list of factors in *Restatement (Second)* into a balancing test to determine whether jurisdiction existing under accepted links such as territoriality should be exercised.[107] The seminal example was the Ninth Circuit *Timberlane* case of 1976.[108] In *Timberlane*, a U.S. corporation operating a lumber company in Honduras sought enforcement of sections 1 and 2 of the Sherman Act against several U.S. corporations for allegedly conspiring to eliminate the plaintiff from the Honduran lumber market.[109] Because Honduran law permitted the defendant's allegedly anticompetitive practices,[110] both the United States and Honduras had credible claims to exercise jurisdiction. The Ninth Circuit held that in such a case of concurrent jurisdiction, court approval of an exercise of extraterritorial jurisdiction would require not only the finding of a sufficient nexus between the United States and the regulated activity but also the examination of the competing interests of the states exercising jurisdiction under a "jurisdictional rule of reason."[111] By balancing a list of factors, the court would determine "whether American authority [existing under a link such as territoriality] *should* be asserted in a given case."[112] This two-step approach—a determination of whether a jurisdictional link exists followed by an evaluation of multiple factors to determine whether the exercise of jurisdiction would be unreasonable—served as the model for sections 402 and 403 of the *Restatement (Third)*.

Thus *Timberlane* and other cases adopting a similar approach, such as *Mannington Mills, Inc. v. Congoleum Corp.*,[113] could be cited as U.S. state practice in support of the reasonableness requirement. An issue of critical importance for the *Restatement (Third)*, however, was whether these courts adopted the rule based on international legal obligation or discretionary comity.[114] In fact, the *Timberlane* court describes its jurisdictional "rule of reason" as a "matter of international comity and fairness," and not as a matter of obligation under international law.[115] The Third Circuit in *Mannington Mills*

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107. *See* Maier, *supra* note 38, at 16 & n.33 (citing cases that adopted balancing test to determine whether jurisdiction based on accepted link should be exercised).

108. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

109. *See id.* at 600–01.

110. *See id.* at 604.

111. *See id.* at 613.

112. *See id.*

113. 595 F.2d 1287, 1297–98 (3d Cir. 1979).

114. There is no bright line distinguishing comity and legal obligation. *See* RESTATEMENT (THIRD) § 101 cmt. e ("Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." (quoting Hilton v. Guyot, 159 U.S. 113, 163 (1895)). Traditionally in the Anglo-American legal system, however, the extension of comity is distinguishable in that it is considered a unilateral, discretionary act of the forum, not a matter of obligation under customary international law. *See* Maier, *supra* note 21, at 281.

115. *See Timberlane Lumber Co.*, 549 F.2d at 615. The *Restatement (Third)* reporters concede that the *Timberlane* rule derives from comity, but they attempt to convert comity into a legal obligation. *See* RESTATEMENT (THIRD) § 403 cmt. a (arguing that U.S. courts applying principle of reasonableness have done so as matter of comity but have simultaneously viewed application of rule as matter of international law).

also did not claim that the standard it adopted was based on international law.[116] A number of authorities agree with this reading of these cases.[117] In an unguarded moment, even Louis Henkin described the courts' uses of the standard as discretionary.[118] The D.C. Circuit, in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,[119] rejected the *Timberlane* and *Restatement (Third)* section 403 approach outright,[120] in part because it found "no evidence" that they represented international law.[121] At the time the *Restatement (Third)* was published, then, there were no cases that applied the reasonableness requirement based on a sense of international legal obligation.

After the *Restatement (Third)* was published, the Supreme Court in *Hartford Fire Ins. Co. v. California* in essence rejected the view that the reasonableness requirement reflects customary law by holding that when effects on U.S. commerce are established, U.S. courts should decline to apply the Sherman Act only when there is a "true conflict between domestic and foreign law"—where a foreign state having concurrent jurisdiction over the matter actually compels conduct prohibited by U.S. law.[122] In *Hartford Fire*, several U.S. states and private parties sued domestic and foreign reinsurers alleging conspiracy in violation of the Sherman Act to restrict coverage terms of general liability insurance available in the United States.[123] The case required the court to decide whether Congress intended to apply the Sherman Act extraterritorially under these facts.[124] In such cases, Congress is presumed to have intended not to violate international law.[125] The majority opinion declined to apply the

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116. *See* 595 F.2d at 1297–98.

117. *See, e.g.*, CASTEL, *supra* note 1, at 58 ("[T]he test adopted by the [*Timberlane*] court does not derive from . . . international law."); Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 465 (1989) (same); Maier, *supra* note 38, at 16 ("Courts interpreting Section 40 treated it not as a rule of law but as a prescription for a mode of decisionmaking designed to alleviate tension among nations."); Cecil J. Olmstead, *Jurisdiction*, 14 YALE J. INT'L L. 468, 473 (1989) (reviewing *Restatement (Third)* and noting that *Timberlane* holding followed discretionary interest balancing of *Restatement (Second)* § 40).

118. *See* 58 A.L.I. PROC. 262 (1981) (comments of Chief Reporter Louis Henkin) (noting that U.S. courts "apply the principle of reasonableness voluntarily, as a matter of comity, and on condition of reciprocity").

119. 731 F.2d 909 (D.C. Cir. 1984). In *Laker*, a British airline sued to enjoin several U.S. and European air carriers' anticompetitive practices. After several defendants obtained injunctions in British courts against the plaintiffs' continuing their suit in the United States, the plaintiffs sought an injunction prohibiting the remaining defendants from seeking similar injunctions. *Id.* at 916–21.

120. *See id.* at 948.

121. *See id.* at 950.

122. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993); *see also* Philip R. Trimble, Comment, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 54–55 (1995). The current Department of Justice Antitrust Enforcement Guidelines cite the *Hartford Fire* holding to support the U.S. government view that interest balancing is a discretionary matter of comity. ANTITRUST GUIDELINES, *supra* note 78, at 21.

123. *See Hartford Fire*, 509 U.S. at 769–79.

124. *See id.* at 812–13 (Scalia, J., dissenting).

125. *See id.* at 814–15 (stating that "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law"). Justice Scalia relied on Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("[An] act of congress ought never to be construed to violate the law of nations if any other possible construction remains.").

reasonableness requirement as the applicable international law and therefore rejected the view, argued by Justice Scalia in his dissenting opinion, that the *Restatement (Third)* accurately represented the applicable customary law.[126] Because he relied on the *Restatement (Third)* for the formulation of customary law, he "got the law wrong."[127] Scalia's dissent demonstrates that the *Restatement (Third)* could indeed influence judges. The next part documents further evidence of that influence.

V. THE INFLUENCE OF THE *RESTATEMENT (THIRD)*

Even though the *Restatement (Third)*'s reasonableness requirement did not accurately reflect customary law when it was published, it has been cited as such by U.S. courts, the U.S. Department of State, and legal scholars. This part examines the influence of the *Restatement (Third)* in these areas and concludes that the *Restatement (Third)* has thereby contributed to the development of a reasonableness norm.

A. *Post-Hartford Fire Citations of Section 403 by U.S. Courts*

Despite *Hartford Fire*'s rejection of the view that the reasonableness requirement is customary law, several U.S. courts have continued to apply the standard as though it were. These cases therefore constitute examples of state practice accompanied by the opinio juris that was missing from *Timberlane* and *Mannington Mills*.

In the first case, *United States v. Vasquez-Valesco*, the Ninth Circuit in 1994 applied the reasonableness requirement to determine whether extraterritorial application of a criminal statute was reasonable under international law.[128] A defendant found to have participated in the murders of two tourists in Mexico was convicted on two counts of committing violent crimes in aid of a racketeering enterprise in violation of 18 U.S.C. § 1959. The defendant argued on appeal that the district court erred in ruling that section 1959 applied extraterritorially.[129] To determine whether the statute applied extraterritorially, the court applied the presumption that Congress intends not to violate international law.[130] To determine the relevant content of international law, the court cited section 403 and applied the reasonableness requirement: "[A]n exercise of jurisdiction on one of these bases [such as territoriality] still violates international principles if it is 'unreasonable.'"[131] Leaving no doubt that

126. *See* 509 U.S. at 818–19 (Scalia, J., dissenting) ("I shall rely on the Restatement (Third) of Foreign Relations Law [including § 403] for the relevant principles of international law."); *see also* Trimble, *supra* note 122, at 54–55.

127. *See* Trimble, *supra* note 122, at 54.

128. *See* 15 F.3d 833, 840–41 (9th Cir. 1994).

129. *See id.* at 838.

130. *See id.* at 839.

131. *See id.* at 840. The court also applied the factors of section 403(2) to determine reasonability. *See id.* at 840 n.6; *cf.* United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991) (stating that

it viewed the application of the reasonableness requirement as an international legal obligation and not as a discretionary act of comity, the court then cited the *Restatement (Third)*'s claim that section 403 "'has emerged as a principle of international law.'"[132] The court ultimately held that extraterritorial application of the criminal statute was "reasonable under international law principles."[133] The Ninth Circuit's erroneous application of the reasonableness requirement as international law probably did not affect the outcome of the case. Strictly speaking, *Hartford Fire* was distinguishable because it was an antitrust case, but the relevance of international law to statutory interpretation was the same in both cases. Thus, the Ninth Circuit ignored a Supreme Court opinion rejecting the reasonableness requirement and instead followed *Restatement (Third)* section 403.[134] In 1997, a district court in Vermont also cited *Restatement (Third)* section 403 for the proposition that under international law, exercises of jurisdiction must be reasonable.[135]

Two recent cases have even cited the dissent in *Hartford Fire* for the proposition that the reasonableness requirement constitutes customary law. In *In re Maxwell Communication Corp., P.L.C.*,[136] a bankruptcy court had to decide whether to apply the Bankruptcy Code extraterritorially.[137] The court drew from Scalia's dissent and *Restatement (Third)* section 403 for the international law principle that the exercises of jurisdiction must not be unreasonable, as determined by the multiple factors of section 403.[138] Similarly, in *Neely v. Club Med Management Services, Inc.*, the Third Circuit cited Justice Scalia's *Hartford Fire* dissent and relied on the *Restatement (Third)* for the international law principle that exercises of jurisdiction must be reasonable.[139] Other courts, of course, have applied *Hartford Fire* correctly.[140] *In re Maxwell* and *Neely*, however, demonstrate that judges will not merely cite the *Restatement (Third)* but will rely on it for a view of international law that

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"courts generally look to international law principles to ensure that an extraterritorial application of United States laws is 'reasonable.'").

132. *See* 15 F.3d at 840 (citing *Restatement (Third)* section 403 cmt. a).

133. *See id.* at 841.

134. The Ninth Circuit repeated this error in United States v. Juda, 46 F.3d 961, 967 (9th Cir. 1995), in which the court looked to international law principles to ensure that extraterritorial application of U.S. law was reasonable.

135. *See* United States v. Greer, 1997 U.S. Dist. LEXIS 2216, at *13 (D. Vt. Feb. 18, 1997). Other opinions that have cited the reasonableness requirement as a principle of international law include United States v. Javino, 960 F.2d 1137, 1142–43 (2d Cir. 1992) (applying rule that "[Congress] may not regulate . . . conduct 'when the exercise of . . . jurisdiction is unreasonable' and applying *Restatement (Third)* section 403(2) factors to determine that extraterritorial application of the statute in question "would likely be ruled unreasonable") and Boureslan v. ARAMCO, 857 F.2d 1014, 1024–26 (5th Cir. 1988) (King, J., dissenting).

136. 170 B.R. 800 (S.D.N.Y. 1994).

137. *See id.* at 814. As in *Hartford Fire*, the court applied the principle that Congress is presumed to have intended not to violate international law. *See id.*

138. *See id.* at 815.

139. *See* Neely v. Club Med Management Servs., Inc., 63 F.3d 166, 183–87 (3d Cir. 1995).

140. *See, e.g.*, United States v. Nippon Paper Indus. Co., 1997 U.S. App. Lexis 4939, at *24–*25 (1st Cir. Mar. 17, 1997) (applying *Hartford Fire* holding that comity concerns defeat exercise of jurisdiction only in rare cases of foreign sovereign compulsion).

lacks support and that has been rejected by the Supreme Court. The *Restatement (Third)* has outlived *Hartford Fire*. United States practice, accompanied by opinio juris, now exists in support of the norm.[141]

B. *Citation of the Reasonableness Requirement by the U.S. Government*

A more striking example of the *Restatement (Third)*'s influence is that the U.S. State Department, which generally has not supported the development of a reasonableness requirement,[142] has now cited the reasonableness requirement as a rule of international law. In communications with Congress prior to the passage of the Helms-Burton Act, the State Department Legal Adviser's Office argued in opposition to its extraterritorial provisions that "international law . . . requires a state to apply its laws to extra-territorial conduct only when doing so would be reasonable in view of certain customary factors."[143] The memorandum does not specifically cite the *Restatement (Third)*, but the reliance on section 403 is unmistakable.

After U.S. trading partners protested the legality of the Act, the Clinton administration suspended the extraterritorial property rights provision indefinitely[144] and promised to lobby Congress to make the visa-denial provision of the statute discretionary.[145] Because these decisions to moderate the exercise of jurisdiction followed diplomatic protests, they could be interpreted as state practice consistent with section 403. But unlike earlier cases such as the pipeline controversy, in which the decision to moderate jurisdiction was not accompanied by opinio juris, this time the State Department was on record stating its view that the reasonableness requirement is an element of international law.

This citation of the reasonableness requirement by the Legal Adviser's Office, however, does not constitute opinio juris because it did not reflect the official position of the government. The memorandum was intended for an intragovernmental policymaking audience rather than for other states and probably was not intended for public dissemination. What is noteworthy, however, is that the international law experts in the Legal Adviser's Office relied on the reasonableness requirement and were apparently unaware that the

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141. U.S. courts have also cited the *Restatement (Third)*'s expansive formulation of the effects doctrine, notwithstanding the argument, *see supra* Part IV, that the formulation does not reflect customary law. *See, e.g.*, United States v. Wright-Barker, 784 F.2d 161, 168–69 (3d Cir. 1986) (citing "new doctrine" that international law permits jurisdiction over conduct where intended effects, and not actual effects, are proven); United States v. Evans, 667 F. Supp. 974, 980–81 (S.D.N.Y. 1987) (citing *Restatement (Second)* section 402 rule that state may exercise jurisdiction when effect or intended effect is substantial and exercise of jurisdiction is reasonable).

142. *See supra* note 96 and accompanying text.

143. *See* DEPARTMENT OF STATE, OFFICE OF THE LEGAL ADVISER, LEGAL CONSIDERATIONS REGARDING TITLE III OF THE LIBERTAD BILL, *reprinted in* 141 CONG. REC. S15106 (daily ed. Oct. 12, 1995).

144. *See* Steven Lee Myers, *One Key Element in Anti-Cuba Law Postponed Again*, N.Y. TIMES, Jan. 4, 1997, at 1.

145. *See* R.W. Apple, Jr., *Split over Cuba Is Eased by U.S. and Europeans*, N.Y. TIMES, Apr. 12, 1997, at 1.

State Department previously had rejected it, just as several U.S. courts relied on it notwithstanding *Hartford Fire*. The *Restatement (Third)* section 403 has taken on a life of its own.[146]

C. *Citations of Section 403 in Academic Literature*

The *Restatement (Third)* also has been cited by numerous legal scholars as a rule of customary international law. As noted below, these academic writings contribute to the development of customary law.[147]

A clear example of the influence of the *Restatement (Third)* on scholarship may be found in J.G. Castel's work on extraterritoriality, where he cites section 403 for the proposition that a reasonableness requirement has emerged in customary law.[148] Other commentators have cited the *Restatement (Third)* section 403 as an authoritative statement of customary law.[149] Extraterritorial U.S. regulations such as the pipeline regulations have been criticized on the grounds that they violate section 403.[150] The Cuban Democracy Act of 1992, as well as the Helms-Burton Act, have been similarly criticized as violating sections of the *Restatement (Third)*.[151] Here again, the *Restatement (Third)* has

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146. Proponents of the Helms-Burton Act also cited the reasonableness requirement. A private lawyer testifying in favor of the Act "reviewed" the Act in light of the factors listed in § 403(2) and concluded that "the current situation . . . weigh[s] in favor of enacting the bill." *Cuban Liberty and Democratic Solidarity Act: Hearings Before the Subcomm. on W. Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 104th Cong. 129, 136, *quoted in* Andreas F. Lowenfeld, *The Cuban Liberty and Democratic Solidarity (Libertad) Act*, 90 AM. J. INT'L L. 419, 431 n.62 (1996).

The Helms-Burton Act also intentionally derived its formulation of effects-based jurisdiction from the *Restatement (Third)*'s expansive formulation of that rule. *See id.* at 430–31 & n.61. Thus, the *Restatement (Third)* formulation of the effects doctrine, which departed from accepted custom, *see supra* note 25 and accompanying text, proved influential on U.S. courts and Congress.

147. *See infra* text accompanying notes 161–63.

148. *See* CASTEL, *supra* note 1, at 24–25.

149. *See, e.g.*, DOUGLAS E. ROSENTHAL & WILLIAM M. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE 58 (1982) (citing *Restatement (Third)* section 403 against U.S. regulation of foreign subsidiaries); Anne-Marie Slaughter, *Interdisciplinary Approaches to International Economic Law: Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 732–33 (1995) (arguing that customary test of jurisdiction has "evolved into" that of *Restatement (Third)* sections 402 and 403).

150. *See, e.g.*, Ellicott, *supra* note 83, at 24. Critics also have cited the *Restatement (Third)* to argue that the pipeline unlawfully regulated foreign subsidiaries, *see id.* at 24; Note, *Extraterritorial Subsidiary Jurisdiction*, 50 LAW & CONTEMP. PROBS. 71, 78–81 (1987), notwithstanding the argument that ownership by U.S. interests constitutes a legitimate basis for the exercise of jurisdiction on the grounds of corporate nationality.

151. Critics of the Cuban Democracy Act have cited both the reasonableness requirement and sections 231 and 414 of the *Restatement (Third)*, which limit the exercise of jurisdiction over foreign subsidiaries. *See, e.g.*, Jason S. Bell, Comment, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act*, 25 INTER-AM. L. REV. 77, 118 (1993) (applying *Restatement (Third)* sections 414, 403, and 213 to argue that Act is "unreasonable under international law"); Harold G. Maier, *Extraterritorial Jurisdiction and the Cuban Democracy Act*, 8 FLA. J. INT'L L. 391, 393 n.11, 394 & n.21, 397 (1993) (citing *Restatement (Third)* sections 403 and 414 in support of proposition that Act violates international law); Allen DeLoach Stewart, Comment, *New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992*, 53 LOUIS. L. REV. 1389, 1394–99 (1993) (applying *Restatement (Third)* sections 213 and 414 to argue against legality of Cuban Democracy Act); Manfred Wolf, *Hitting the Wrong Guys: External Consequences of the Cuban Democracy Act*, 8 FLA. J. INT'L L. 415, 418–19 (1993) (arguing that Cuban Democracy Act violates reasonableness requirement); Julia Herd, Note,

proven influential on a group of experts with access to primary evidence of state practice and skill in identifying opinio juris. If the many international legal scholars reading the *Restatement (Third)* do not research the underlying customary law, general practitioners and judges can hardly be expected to do so.

D. *Motives for the ALI's Cultivation of the Reasonableness Requirement*

Why did the restators deviate from customary law in stating that the reasonableness requirement is law despite the strong evidence against its existence? One possibility is that lawyers representing commercial interests might have lobbied the ALI for rules that would limit the reach of U.S. antitrust and export control law, just as they did during the drafting of the *Restatement (Second)*.[152] There is no evidence that such lobbying took place during the drafting of the *Restatement (Third)*, however.[153]

A more likely explanation is that the reporters chiefly responsible for the drafting of the *Restatement (Third)*, Louis Henkin and Andreas Lowenfeld, viewed their demanding work on the *Restatement (Third)* as an opportunity to promote desirable change in the law.[154] Commentators have noted, for example, that the reasonableness requirement drew heavily from a series of lectures by Andreas Lowenfeld,[155] in which he argued that international law prohibits unreasonable exercises of jurisdiction, as determined by a list of factors similar to those in section 403(2).[156] Louis Henkin also personally favored a restrictive rule.[157] At one point during the ALI's floor debate regarding section 403, Henkin defended his view of section 403 by noting he had been "teaching it for twenty five years."[158] One adviser to the reporters, Harold Maier, noted that it was unavoidable that restators would seek to move the law a little: "It is neither

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The Cuban Democracy Act: Another Extraterritorial Act That Won't Work, 20 BROOK. J. INT'L L. 397, 407 n.49 (1994); *id.* at 413 n.70 (citing *Restatement (Third)* section 403); *id.* at 419 & n.96 (citing *Restatement (Third)* sections 213 and 414 cmt. e).

For discussion of the Helms-Burton Act, see Lowenfeld, *supra* note 146, at 431 (arguing that Helms-Burton Act violates *Restatement (Third)* section 403 and therefore is inconsistent with international law).

152. *See* Metzger, *supra* note 21, at 16 (noting that, during drafting process of *Restatement (Second)*, lawyers representing commercial interests lobbied first to defeat, and then to moderate, effects jurisdiction).

153. *See generally* 1987 ASIL Panel, *supra* note 18; 1982 ASIL Panel, *supra* note 33.

154. There is evidence that the reporters viewed international order as a desirable end of international law. *See* RESTATEMENT (THIRD) § 103 cmt. a ("A determination as to whether a customary rule has developed is likely to be influenced by assessment as to whether the rule will contribute to international order.").

155. *See* Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311 (1979).

156. *See* Maier, *supra* note 38, at 18 (noting that Lowenfeld was "intellectual father" of section 403); 62 A.L.I. PROC. 407 (1985) (comments of Karl Meessen) (noting that subsections 403(1)–(2) "subscribe to a theory of reasonableness that has been laid down admirably by Andreas Lowenfeld in his Hague lectures and that . . . has no foundation in international law"); *see also* RESTATEMENT (THIRD) 237 (citing Lowenfeld lectures). *See generally* Lowenfeld, *supra* note 155.

157. *See* 62 A.L.I. PROC. 403 (1985) (comment of Louis Henkin).

158. *See id.* (defending *Restatement (Second)* approach that rejected U.S. Department of State's position).

possible nor wise, I think, for any self-respecting academic to undertake a task of 'restating' without making at least some attempt to 'improve' the law during that process."[159] Another reviewer openly commended the restators for formulating the reasonableness requirement despite its lack of acceptance in customary law because doing so would help change the law. "[I]f one asserts a point strongly and often enough," the reviewer noted, "the point tends to become externally accepted or at least taken seriously."[160]

The restators were well aware of their potential influence. The considered writings of scholars are, under article 38 of the Statute of the International Court of Justice, "subsidiary means for the determination of rules of law."[161] The *Restatement (Third)* cites this principle in its section on sources of international law;[162] the reporters self-consciously added that "[s]uch writings include . . . systematic scholarly presentations of international law such as this Restatement."[163] By "restating" the reasonableness requirement in black letter, the reporters hoped to shift the law in that direction.

It would be unreasonable, of course, to expect a black letter *Restatement* to capture perfectly the evolving normative system of customary law. It has become increasingly difficult to identify what customary law is and what it is in the process of becoming.[164] As Herbert Weschler noted, restators, like judges, are inevitably influenced by their view of what the law should be when they state existing law.[165]

There is, however, a flaw in the analogy between restators and judges. Judges cannot separate their vision of the "ought" from the "is" because often they must apply existing law to new sets of facts not contemplated by the existing law; their vision of what the law should be helps fill those gaps.[166] The restators, however, do not apply rules to particular sets of facts and therefore are not obliged to fill gaps. They draft against a blank slate; any expansion of

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159. 1987 ASIL Panel, *supra* note 18, at 181 (comments of Harold Maier). Other commentators noted this tendency. Karl Meessen, an international consultant to the *Restatement (Third)*, noted that "[r]eporters and other restators . . . are human beings. All their frustrations are best rewarded if they can be acknowledged as having moved the law a little ahead toward more fairness and justice. Such efforts have been undertaken throughout the *Restatement*, although with varying intensity." Meessen, *supra* note 33, at 437. As Monroe Leigh noted:

> The very process [of customary law creation] offers temptations to the aficionados of international law . . . to yield to an addiction peculiar to their profession, the addiction of declaring that a favorite proposition of law has now become customary international law and is therefore binding on everybody. Especially if the favorite proposition is close to the goal line of acceptance, international lawyers . . . even in restatements such as this, find it difficult to resist the temptation to nudge that favorite proposition across the goal line and into the end zone of customary international law.

1987 ASIL Panel, *supra* note 18, at 191 (comments of Monroe Leigh).

160. Norton, *supra* note 65, at 57; *see also* Maier, *supra* note 21.

161. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(I)(d), *reprinted in* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (4th ed. 1990).

162. *See* RESTATEMENT (THIRD) § 103(2)(c).

163. RESTATEMENT (THIRD) § 103 rep. note 1.

164. *See, e.g.*, Robert Y. Jennings, *What Is International Law and How Do We Tell It When We See It?*, 37 ANNUAIRE SUISSE DE DROIT INT'L 59, 67 (1981).

165. *See supra* text accompanying note 17.

166. *Cf.* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 129 (1921).

the law is gratuitous. As long as the *Restatements* claim to mirror existing law, they should limit their rules to those that are supported by widespread state practice accompanied by opinio juris, especially for crucial jurisdiction provisions such as *Restatement (Third)* section 403. Furthermore, not all scholars agree that it is inherently difficult to state what the law is. Some argue emphatically that the reporters can and should "differentiate clearly what the law is at the time of writing from what the developing tendencies appear to be, and from what the reporters think the law or such tendencies ought to be."[167] The usefulness of the entire *Restatement* diminishes when the accuracy of one of its key sections is called into question. Judges and practitioners who rely on the *Restatement* because of its user-friendliness will do so only as long as they perceive that it is authoritative.

A further argument against the use of the *Restatement* forum to promote the reasonableness requirement is that the standard itself is not desirable. First, the widespread adoption of a reasonableness requirement by U.S. courts would introduce a procedurally complicated hurdle to the exercise of jurisdiction.[168] Defendants in any case involving the extraterritorial application of U.S. law could challenge the exercise of jurisdiction as unreasonable; the reasonableness requirement thus tilts the playing field in such cases in favor of the defendant. Indeed, the D.C. Circuit declined to adopt the balancing test of section 403(2) in part because the difficulty and unpredictability of its application create "powerful incentives for increased litigation on the jurisdictional issue itself."[169] Even if the standard did not change the outcome of judicial opinions, it could result in reduced settlements for plaintiffs in civil cases and reduced plea bargains for defendants in criminal cases. This result should not come about from the importation of a reasonableness test from the *Restatement*. At best, the reasonableness requirement, like other multipart tests and balancing formulas, gives a patina of rationality to an area of law on which there is little substantive agreement.[170]

Second, the reasonableness requirement encourages the legalization of policy disputes that are best addressed on a political-diplomatic level. As former Legal Adviser Davis Robinson noted, "[a]n effort to limit questions of conflicts of jurisdiction to purely legal questions of the power, or even the propriety, of

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167. Metzger, *supra* note 21, at 7; *see also id.* (noting purpose of *Restatements* "should be to set out existing law as accurately as possible"); Olmstead, *supra* note 24, at 476 ("If a proposed principle has not been accepted as law, it has no place in a restatement."); *id.* at 485 ("By definition a restatement is designed to reflect the law and not speculate as to what might be desirable.").

168. *See* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 950 (D.C. Cir. 1984) ("Procedurally, . . . balancing would be difficult, since it would ordinarily involve drawn-out discovery and requests for submissions by political branches.").

169. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 n.2 (D.C. Cir. 1987); *see also* Reinsurance Co. v. Administratia Asigurarilor, 902 F.2d 1275, 1283–84 (7th Cir. 1990) (Easterbrook, J., concurring) (questioning feasibility of applying *Restatement*'s interest balancing as means of resolving extraterritorial discovery disputes and declining to follow); *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (rejecting balancing test approach in extraterritorial discovery dispute as "unworkable").

170. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 348–49 (1993).

exercising jurisdiction is bound to impose an analytical rigidity inconsistent with the flexibility required by the widely-varying demands of diplomacy and foreign policy."[171] The executive branch is in the best position to decide when the United States should defer to other states based on comity principles, rather than raise the diplomatic stakes by arguing legal positions. Ultimately, disputes such as those arising from the Helms-Burton Act are resolved through diplomacy, not through international legal fora.

VI. CONCLUSION

There are two ways in which the ALI could, when it publishes the *Restatement (Fourth) of Foreign Relations Law*, rectify the misstatement of the customary rules of prescriptive jurisdiction in the *Restatement (Third)*. First, it could delete the reasonableness requirement altogether. The nexus requirement of section 402, which does reflect customary law, could be relied on instead.

Second, the ALI could modify the presentation of the *Restatement* to indicate clearly which rules provoked, as the reasonableness requirement did,[172] significant dissent within the organization. This is necessary because in contrast to the drafting procedure for *Restatements* of domestic law, practitioners and judges have no straightforward means to verify the *Restatement (Third)*'s formulations. And despite the recognition that the *Restatement (Third)* has the potential for greater influence than other *Restatements*, the ALI did not augment its standard drafting procedure.[173] Given this influence, more care should be exercised to state the law accurately, either at the drafting stage or in the presentation of the final product. Under the ALI's winner-take-all voting system, the membership may decide something on a close vote but then state a clear black letter rule as if it had received unanimous agreement. If the restators act as judges do, they should publish dissents. The *Restatement (Fourth)* could also adopt the method of the ALI's *Corporate Governance Project* and include commentary distinguishing existing law from the ALI's recommendations.[174]

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171. Robinson, *supra* note 96, at 1149.

172. For views expressed in ALI floor sessions dissenting from the reasonableness requirement, see 63 A.L.I. PROC. 103 (1986) (comments of Sigmund Timberg) (arguing that case has not been made that "failure to weigh evidence" under section 403(3) is violation of international law); 62 A.L.I. PROC. 407 (1985) (comments of Karl Meessen) (stating that the reasonableness requirement "ha[s] no foundation in international law"); *id.* at 412 (comments of Professor Don Wallace Jr.) (questioning existence of cases supporting subsections 403(2)-(3)); 58 A.L.I. PROC. 259-60 (1981) (comments of Bennett Boskey) (noting skepticism among *Restatement* advisors about "new test" introduced by section 403); *id.* at 265 (comments of Cecil Olmstead) (agreeing with Boskey "in not finding anything in international law" supporting section 403).

173. *See* RESTATEMENT (THIRD) at xi (noting that drafting of *Restatement (Third)* followed "Institute procedure"). For further description of the drafting process, see HAZARD, *supra* note 12, at 9-10; 1987 ASIL Panel, *supra* note 18, at 183-84 (comments of Detlev Vagts).

174. *See* Abrahamson, *supra* note 12, at 23; *see also* 1982 ASIL Panel, *supra* note 33, at 205 (remarks of Detlev Vagts) (recommending corporate governance project approach that would include commentary stating where black-letter rules deviate from existing law); Melvin A. Eisenberg, *Chief*

By the time the *Restatement (Fourth)* is published, however, there may be enough state practice supported by opinio juris, by the United States and others, to support the reasonableness requirement as customary law.

Reporter's Foreword to PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS at xxv (1994) (noting that Principles of Corporate Governance distinguish between "rules of law" in black letter and "recommendations of corporate practice" which are stated in "a special gray-letter format").